No. 02-371

APR 4 2003

In the Supreme Court of the United States

COMMONWEALTH OF VIRGINIA, PETITIONER

v.

KEVIN LAMONT HICKS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR AMICI CURIAE RICHMOND TENANTS ORGANIZATION, CHARLOTTESVILLE PUBLIC HOUSING ASSOCIATION OF RESIDENTS, ENPHRONT, & MASSACHUSETTS UNION OF PUBLIC HOUSING TENANTS IN SUPPORT OF RESPONDENT KEVIN LAMONT HICKS

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INTERESTS OF THE AMICI CURIAE[1]

Amici Curiae are tenant organizations representing public housing residents in communities around the nation. Their members, and the communities in which they reside, are directly affected by trespass prohibitions similar to the one at issue here. Each of these tenant organizations has an interest in ensuring that this Court maintain and enforce clear and

[1] Amici Curiae have obtained the written consent of Petitioner's and Respondent's counsel to file this brief with the Court. The written consents are filed accompanying this brief pursuant to Supreme Court Rule 37.3(a).

Pursuant to Supreme Court Rule 37.6, Amici Curiae note that counsel for Amici wrote the entirety of this brief and that no person or entity, other than the Amici Curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

long-standing laws protecting their members' rights to have guests and other visitors.

Amicus Richmond Tenants Organization (RTO) is a duly incorporated Virginia organization, whose membership consists of all residents of public housing in the City of Richmond, Virginia. RTO, comprised of elected representatives from Richmond Redevelopment and Housing Authority (RRHA) public housing projects, works to promote and further legal, social, and economic rights of all residents of conventional public housing. Through attendance at tenant council meetings, grass-roots lobbying, dissemination of information in the community, and communication with RRHA, the RTO has educated the thousands of individuals it represents about their rights and developments in the public housing field.

Amicus Charlottesville Public Housing Association of Residents (PHAR) is a city-wide resident-run association serving hundreds of public housing residents in Charlottesville, Virginia. Its mission is to empower residents to improve their communities through collective action. PHAR educates public housing residents about issues that affect them, such as residents' rights to have guests, and encourages residents to participate in the shaping of the public housing authority's policies.

Amicus ENPHRONT (Everywhere and Now Public Housing Residents Organizing Nationally Together) is a resident-led organization with members and affiliates in forty-six states, in addition to Puerto Rico and the District of Columbia. ENPHRONT advocates for the preservation, improvement and development of public housing through coordinated local and national action. The organization also works to educate residents about the laws and policies affecting their lives, including those governing the right to invite business and social visitors and guests into their homes.

Amicus Massachusetts Union of Public Housing Tenants (Mass Union), a membership organization including individual public housing residents and local tenant councils, represents thousands of tenants across Massachusetts. It seeks to create, preserve, and advance safe and secure public housing communities through responsible behavior by both tenants and housing authorities. In recent years, many of Mass Union's members have objected to their housing authorities' trespass policies too broadly restricting residents' rights to have guests. Mass Union members believe that while housing authorities should act vigilantly to protect families from crime and violence, they should not unnecessarily infringe upon residents' rights. Recently, Mass Union has undertaken efforts to educate all of its members about their rights to have guests in their homes.

SUMMARY OF ARGUMENT

Trespass prohibition practices such as the one utilized by the Richmond Redevelopment and Housing Authority (RRHA) pose a significant risk of trampling upon the well-established rights of public housing residents to associate with and invite others into their homes. The millions of men, women, and children who, because of their poverty, live in publicly financed residences[2] are not subject to greater infringement of their rights than those who are able to afford private housing. To the contrary, because public housing residents' lack of financial resources significantly reduces their ability to obtain private housing of their choice,[3] it is all

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[2] In 1998, nearly three million people lived in public housing. *See HUD, A Picture of Subsidized Households - 1998. At* http://www.huduser.org/datasets/assthsg.html (last modified Mar. 20, 2003).

[3] Petitioner and Amici in support of Petitioner concede that public housing residents lack the financial resources to obtain different housing. Pet. Br. at 35-36 ("low-income tenants in public housing often have few choices about where they live"); Amici City of Richmond and RRHA Br. at 3 (stating that most residents do not have the "capability to relocate"); *see also* Amicus Criminal Justice Legal Foundation Br. at 3 (stating that residents "must" live in public housing); Amici States Br. at 19 (stating

the more important to defend their rights from encroachment by housing authorities.

Public housing residents' rights to associate with and invite others into their homes are recognized in several bodies of jurisprudence. Federal law and regulations acknowledge and protect public housing residents' right to accommodate guests and visitors in their residences. The common law governing landlord-tenant matters recognizes that a tenant obtains possession of the leased premises and therefore has the right to invite others into her home. Finally, the Constitution protects the right of intimate association and right to have access to information, undergirding public housing residents' rights to interact with persons of their choosing on their leased property.

The RRHA no-trespass policy, and others like it across the country, could have far-reaching and untenable consequences for public housing residents. RRHA's policy authorizes law enforcement to notify unauthorized persons (*i.e.*, nonresidents, non-employees, or persons who cannot demonstrate a "legitimate business or social purpose" for being on the premises) that they are forbidden from returning to the property.[4] J.A. 84. The policy does not adequately explain what a "legitimate" purpose is or how the nonresident can demonstrate such a purpose. Under this broad standard, it is all too likely that law-abiding nonresidents such as family members, friends, clergypersons, health professionals, tenant organizers, legal advocates, and other persons with whom a resident wishes to interact can be banned from the resident's property.

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that public housing residents are "among the most vulnerable in our society").

[4] The determination as to the legitimacy of the person's presence, in the first instance, is left to an individual police officer. In addition, if a person requests permission to come on the property for any reason such as leafleting or to hold a religious meeting, the housing authority manager makes the standardless determination of whether to grant permission or not. J.A. 37-38.

An individual who has been barred from the property, although not for the commission of a crime or other disruptive behavior, can be arrested and convicted of trespass if he enters the property again for a lawful and reasonable purpose such as the invitation of a friend or family member residing on the property.

The RRHA policy does not require that the resident be notified that a person asserting that he is a visitor is attempting to see him or her – not at the initial barring or at any subsequent return to the property resulting in arrest for trespass. Furthermore, the policy does not require that a banned person, or the resident affected by the barment, be notified of any procedure for challenging the banning. Even if the person learns of the established mechanism for challenging his barment, the only way that a person may be removed from banned status is to file a written request with the director of operations of the housing authority who appears to exercise unfettered discretion without the assistance of any written guidelines. J.A. 34-36.

Inarguably, public housing residents should not have to tolerate dangerous and crime-ridden communities. Yet, it would be perverse to pursue the goal of crime prevention to the exclusion of all other rights and interests of public housing residents. The quality of residents' lives is comprised of a multitude of factors, not simply safety. Public housing residents, like those who live in private housing, can and should expect to be safe in their communities *and* to exercise their rights to live a "normal" life.

Amici agree with Respondent that the RRHA no-trespass policy is both vague and overbroad. In addition, the policy is problematic because it unnecessarily and unreasonably encroaches upon residents' rights to have guests and visitors come to their homes. Amici respectfully request that the Court, in deciding the issues presented in this case involving access of a nonresident to public housing, remain cognizant

of the danger that the no-trespass policy poses to residents' rights.

ARGUMENT

I. PUBLIC HOUSING RESIDENTS HAVE THE WELL-ESTABLISHED RIGHT TO INVITE AND RECEIVE GUESTS AND VISITORS INTO THEIR HOMES.

A. FEDERAL STATUTES AND REGULATIONS RECOGNIZE AND PROTECT THE RIGHT OF PUBLIC HOUSING RESIDENTS TO INVITE AND ACCEPT GUESTS AND VISITORS INTO THEIR DWELLINGS.

Federal law and regulations recognize the right of public housing residents to accommodate their guests and to be free from unreasonable lease conditions and regulations. The United States Housing Act of 1937 established a mechanism to promote the provision of "decent and affordable housing" for low-income families. 42 U.S.C. § 1437(a)(4) (2000). Under the Act, Congress authorizes the U.S. Department of Housing and Urban Development (HUD) to provide various methods of financial assistance to local public housing agencies (PHAs) for the construction and operation of low-income housing. *See* 42 U.S.C. §§ 1437 to 1437bbb-9 (2000). Local PHAs that are responsible for administering the federally financed housing projects are subject to extensive statutory and regulatory requirements governing virtually every aspect of public housing. Of particular importance to the case now before this Court, PHAs are required to acknowledge that residents have the right to reasonably accommodate guests and visitors in their homes. 24 C.F.R. § 966.4(d) (2002). Federal law also mandates that PHAs cannot subject tenants to unreasonable terms and conditions in their leases, 42 U.S.C. § 1437d(*l*) (2000), or require them to abide by PHA regulations that are not necessary and reasonable. 24 C.F.R. § 966.4(f). No-trespass policies that work in

reality to bar invited guests and other visitors who have done nothing to warrant exclusion from the premises violate these protected rights.

Federal regulations mandate that a public housing "lease shall provide that the tenant shall have the right to exclusive use and occupancy of the leased unit by the members of the household authorized to reside in the unit in accordance with the lease, including *reasonable accommodation of their guests*." 24 C.F.R. § 966.4(d)(1) (emphasis added).[5] The right of public housing residents to reasonably accommodate guests in their homes has long been recognized by HUD. Prior to codifying the right, HUD issued a circular and a model lease form to local housing authorities regarding requirements and recommendations to be reflected in tenant dwelling leases for low-rent public housing projects. HUD Circular RHM 7465.8 (Feb. 22, 1971). The circular and the model lease were developed with the intention of improving management-tenant relationships and promoting an "improved housing environment to the advantage of the low-rent housing program, its beneficiaries, and the communities in which such housing is located." *Id.* at 1.[6] The model lease required PHAs to include a provision that the tenant's "reasonable accommodation" of guests and visitors was not excluded.[7] Circular RHM 7465.8, App. 1, at 3. The model

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[5] HUD has the statutorily-granted power to promulgate regulations necessary to implement the federal public housing programs. 42 U.S.C. § 3535(d) (2000).

[6] HUD also issued Circular RHM 7465.9 (Feb. 22, 1971) regarding grievance procedures in low-rent public housing projects. See *City of Omaha v. United States Hous. Auth.*, 468 F.2d 1, 3 (8th Cir. 1972) for brief discussion of background leading up to the issuance of these circulars.

[7] The provision in the Model Lease provided as follows:

> OCCUPANCY OF THE DWELLING UNIT. Tenant agrees not to assign this lease, not to sublet or transfer possession of the premises; nor to give accommodation to boarders or lodgers without the written consent of Management. Tenant further agrees not to use or per-

lease requirement for reasonable accommodation of guests later became a federal regulatory mandate.[8] One of the "central aspects of the subsidized tenancy,"[9] the requirement has remained a constant protection for public housing residents.[10] Additional federal regulations further demonstrate HUD's recognition of a tenant's right to have visitors and guests. *See* 24 C.F.R. § 966.4(f)(10) (requiring lease provision that tenant is responsible for damages to dwelling or project caused by the tenant, a member of the household, or a *guest*); 24 C.F.R. § 966.4(f)(11) (requiring lease provision that tenant, a household member, or a *guest* should act in manner that does not disturb other residents' peaceful enjoyment and will be conducive to maintaining the project in a decent, safe, and sanitary condition); 24 C.F.R. § 966.4(f)(12) (requiring

> mit the use of the dwelling unit for any purpose other than as a private dwelling unit solely for the Tenant and his family and/or dependents. *This provision does not exclude reasonable accommodation of tenant's guests or visitors.* Tenant agrees to abide by such necessary and reasonable regulations as may be promulgated by Management for the benefit and well being of the housing project and the tenants.

HUD Circular RHM 7465.8, App. 1 at 3 (emphasis added).

[8] *See* Lease and Grievance Procedures, 40 Fed. Reg. 33,402, 33,404 (Aug. 7, 1975).

[9] Tenancy and Administrative Grievance Procedure for Public Housing, 53 Fed. Reg. 33,216, 33,220 (Aug. 30, 1988).

[10] Remarkably, in 1982, when HUD attempted to dismantle many of its regulations affording protections to public housing tenants, it did not seek to eliminate the regulatory acknowledgement of their right to reasonably accommodate guests. *See* Lease Requirements, Eviction, and Hearings, 47 Fed. Reg. 55,689 (proposed Dec. 13, 1982) (proposing, *inter alia*, to limit grievance procedures available to tenants). Congress blocked HUD's deregulatory efforts by passing the Housing and Urban-Rural Recovery Act of 1983, Pub L. No. 98-181, § 204, 97 Stat. 1153 (adding statutory provisions to U.S. Housing Act of 1937 to require, *inter alia*, that HUD develop regulations requiring PHAs to establish and implement administrative grievance procedures and that PHAs shall utilize leases that "do not contain unreasonable terms and conditions").

lease provision prohibiting tenant, household member, *guest*, or "*other person under the tenant's control*" from engaging in certain criminal activities) (emphasis added).

Lower courts that have considered the effect of section 966.4(d)(1) on policies affecting residents' right to have visitors have agreed that it "substantively prohibits public housing authorities from unreasonably interfering with tenants' ability to entertain guests in the tenants' public housing apartments." *Diggs v. Hous. Auth. of Frederick*, 67 F. Supp. 2d 522, 532 (D. Md. 1999); *see also Thompson v. Ashe*, 250 F.3d 399, 409 (6th Cir. 2001) ("Federal law requires reasonable accommodation of guests in public housing.");[11] *Lancor v. Lebanon Hous. Auth.*, 760 F.2d 361, 363 (1st Cir. 1985) (holding that a policy requiring public housing residents to obtain written permission from housing authority management for overnight guests does not provide for the reasonable accommodation of a tenant's guests or visitors).

In *Diggs*, the federal district court considered the legitimacy of a public housing no-trespass policy similar to the RHHA practice at issue here. In that case, persons believed to be on the public housing authority property with "no apparent legitimate reason" were issued citations that warned

[11] Although *Thompson* recognized the right of public housing residents to reasonably accommodate their guests, it did not reach the question of whether the policy in question violated tenants' rights because Thompson, arrested for trespass, lacked standing to assert tenants' rights and was not on the property at the invitation of a resident. *Thompson*, 250 F.3d at 409.

In the case now before this Court, Petitioner asserts that Mr. Hicks lacks standing to assert the First Amendment rights of others. As Respondent correctly observes, however, the function of overbreadth standing is precisely to consider the First Amendment rights of third parties. Furthermore, although a criminal case directly involves only the trespass charge brought against a defendant, if the Court overlooks the impact of the policy on public housing residents, it may lead to a decision that substantially undermines those residents' rights. The Court should not decide this case in such a vacuum. Amici submit this brief in order to voice the concerns of residents who are affected by this no-trespass policy.

them that they would be arrested and charged with criminal trespass if they returned. *Diggs*, 67 F. Supp. 2d at 525 (internal quotations omitted). The decision whether to remove the person from the list of persons prohibited from reentering the property was completely discretionary on the part of the housing authority's executive director; there were no written standards or time deadlines to govern her decision. *Id.* at 527. The court granted the resident plaintiffs' request for a preliminary injunction and in doing so, reasoned that the no-trespass policy caused substantial harm to tenants' rights because it operated as a "virtually permanent bar to a tenant's right to invite a guest into her own home, no matter how close a friend or relative that potential guest might be." *Id.* at 533.

In addition to the explicit recognition of public housing residents' rights to have guests and visitors, federal statutory and regulatory provisions more broadly prohibit the imposition of unreasonable lease terms and other requirements upon public housing tenants. The U.S. Housing Act of 1937 prohibits the inclusion of "unreasonable terms and conditions" in public housing leases. 42 U.S.C. § 1437d(*l*)(2).[12] Similarly,

[12] No exhaustive list of prohibited terms and conditions is explicitly identified by the statute or its implementing regulations. Rather, many attempted actions by a housing authority may be considered to be unreasonable. *See* H. R. Rep. No. 98-123, at 36 (accompanying earlier version of Housing and Urban-Rural Recovery Act of 1983 (H.R. 1); the provisions in H.R. 1 that added requirement that leases not contain unreasonable terms and conditions are same as the bill that was ultimately passed by both House and Senate (H.R. 3959), *see* Pub. L. No. 98-181, 97 Stat. 1153) ("The PHA leases must also not contain unreasonable, unfair, or unconscionable provisions, such as requirements that the tenants waive rights granted by state or federal law. Since 1970 HUD has prohibited PHAs from utilizing unfair clauses [such as confession of judgment; distraint clauses; exculpatory clauses; waivers of legal notices, legal proceedings, jury trials, and appeals; and clauses requiring tenants to pay costs regardless of outcome]. The bill requires that those regulatory prohibitions be retained and that HUD prohibit as well any additional clauses which are unreasonable"); *see also* 24 C.F.R. § 966.6 (2002).

federal regulation of PHAs requires a lease provision that tenants' obligations include abiding by regulations that are "necessary and reasonable." 24 C.F.R. § 966.4(f)(4).[13] Under these provisions, the abridgement of public housing residents' right to receive visitors is "patently unreasonable." *Diggs*, 67 F. Supp. 2d at 531 (interpreting section 1437d(*l*)(2)). *See also Thompson*, 250 F.3d at 409 (referencing section 1437d(*l*)(2)); *Lancor*, 760 F.2d at 363 (holding that housing authority requirement that tenants obtain written permission from management for overnight guests was neither necessary nor reasonable as required by section 966.4(f)(4)).

No-trespass policies like the one used by the RHHA unlawfully encroach upon residents' rights to reasonably accommodate guests and other visitors. It is all too likely that the RHHA procedure will have the effect of improperly excluding residents' lawful visitors in the first place and continuing to exclude them solely because of their initial barment. The policy also does not adequately consider or allow for residents' choices or provide proper procedures to remedy unfair or erroneous barments.

Nonresidents who have not committed any crime or engaged in any behavior that would jeopardize the health and/or safety of residents may nevertheless, under the policy, be forbidden from returning to the property if they have not satisfied the vague requirement that they be there for a "legitimate business or social purpose." What comprises a "legitimate purpose" is not set forth in any written policy for the benefit of police, housing authority staff, or residents. *See* J.A. 17-18. Thus, under this broad policy, a clergyperson, nonresident child, or grandparent of a public housing resident

[13] The regulation requires a lease provision obligating the tenant to "abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease[.]" 24 C.F.R. § 966.4(f)(4).

who visits a resident in response to an express or implied invitation could be banned from the property if unable to satisfy the nearly standardless requirement of legitimacy.

Moreover, the only procedure available to such a banned person to challenge his barment is to submit a written request to the director of operations of the housing authority, but there is apparently no notice given by the law enforcement officer issuing the barment notice that this is the required procedure. The record does not demonstrate that there are any guidelines or time deadlines that bind the director's decision. J.A. 34-35. Thus, although Mr. Hicks apparently twice asked to be removed from the banned list, J.A. 40, his requests were refused, with no apparent explanation, and there is nothing in the record to indicate that he was ever told that he had to make his requests in writing.

If the circumstances of the original barment are flawed as described above, a significant and lasting invasion of the rights of public housing residents can ensue, despite the stated intention to preserve the right of residents to visit with "legitimate" guests set forth in the pamphlet issued to residents when the streets were privatized in 1997. J.A. 87.[14] If a banned person returns to the public housing property to visit a friend or relative that lives there, he or she will be arrested for trespass. A lawful and otherwise suitable visitor who has previously been forbidden from returning to the property can be subject to arrest for trespassing without regard to the purpose of his visit. Even a person who is invited onto the property is prohibited from doing so if he was previously banned. J.A. 42. As in the case of Mr. Hicks, a nonresident parent who seeks to provide care and nurture to his infant child will also be subject to arrest if he returns to the

[14] While the policy appears to protect the rights of residents to have guests, in practice, it is too vague to do so. Note, for example, that Kevin Hicks had relatives in Whitcomb Court but the record does not reflect the circumstances under which he was *first* told that he was not permitted to return to the property.

property if previously found to be there without a "legitimate reason." Residents risk their own tenancy if they invite a banned person to their property, even if the person is a close family member and/or the invitation is inadvertently given without knowledge that a person has been banned. J.A. 39. The "option" presented by Petitioner that public housing residents can simply meet with friends, family, and other individuals off of their leased property is not a workable solution; rather, it proposes reducing public housing residents to second-class citizens.

Furthermore, resident notification and participation is nonexistent in the RRHA scheme. For example, neither at the initial barment nor at any subsequent arrest does the RRHA no-trespass policy require that a resident be notified that a person is trying to visit with her; thus, the policy never allows the resident to assist in the determination of the nonresident's legitimacy of purpose by vouching for and accepting him as a visitor.[15] In addition, the policy does not require

[15] In addition, there is no evidence in the record to suggest that Whitcomb Court residents have consented to such a no-trespass policy as a condition of their lease. By law, public housing residents are afforded procedural protections before they can be made subject to changed lease provisions or other housing authority regulations. HUD recognizes the "importance of resident involvement in creating a positive living environment and actively participating in the overall mission of public housing." 24 C.F.R. § 964.1 (2002). Before a public housing authority can change provisions in the lease form it uses, it must provide at least thirty days notice to tenants and resident organizations setting forth the proposed changes in the lease. 24 C.F.R. § 966.3 (2002). The PHA must also provide an opportunity for written comments which it is required to consider before adopting any new terms in the lease form. *Id.* Before the lease may be changed, it must be by written agreement of the PHA and the tenant. 24 C.F.R. § 966.4(a)(3).

Apparently, the RRHA policy was also not properly promulgated as a rule with which public housing tenants must comply. In order for a tenant to abide by necessary and reasonable housing authority regulations, a PHA must promulgate the regulations in compliance with procedural requirements to post them in a conspicuous manner. 24 C.F.R. § 966.4(d)(4); 24 C.F.R. § 966.5 (2002). In addition, if the PHA modifies

that a resident receive notice that a guest has been banned or provide a procedure by which the resident can challenge the prohibition.

No-trespass policies like the one in this case unreasonably deprive residents of the right to accommodate persons with whom they choose to interact in their own dwellings. This is so because standardless policies can far too easily result in erroneous banning, and procedureless policies can far too easily result in trespass convictions. Certainly, in its efforts to protect public housing residents from crime in their community, RHHA could not have intended that public housing residents needed to be protected from persons whose sole criminal act was that of trespass when they returned to the property to visit a resident. In this regard, the housing authority has created the crime and the criminal.

B. UNDER THE COMMON LAW, TENANTS HAVE THE RIGHT TO INVITE AND RECEIVE GUESTS AND VISITORS INTO THEIR LEASED DWELLINGS.

1. Tenants in possession of leased property have the authority to invite persons on the property.

It is with good reason that federal law concerning public housing protects and preserves the rights of residents to accommodate their guests. Under long-standing common law

rules and regulations, it must give at least thirty days written notice to each affected tenant and provide an opportunity for the tenant(s) to present written comments which must be taken into consideration by the PHA before making the proposed modification effective. 24 C.F.R. § 966.5. The housing authority manager testified that the pamphlet distributed to residents when the streets were privatized was not a policy, rule, or regulation. J.A. 17, 22. The only other writing concerning the "policy" was a written authorization given to law enforcement to ban persons with no "legitimate purpose" to be on the property and to arrest them if they return. J.A. 17-18. Thus, RRHA failed to recognize its obligation to give residents notice and an opportunity to comment before instituting the new rule reflected in these documents.

in virtually every jurisdiction in the United States, a tenant obtains legal possession of leased premises and enjoys the rights associated therewith.[16] When a landlord and a tenant enter into a residential lease, possession of the property is transferred to the tenant for a limited period of time in exchange for rent, and the landlord must, at the lease's start, relinquish certain rights. 5 *Thompson on Real Property*, § 40.01, at 5-6, § 40.22(b), at 134 (David A. Thomas ed., 1994). The tenant, during the lease period, should be treated as a purchaser of the property. *Lott v. State*, 132 So. 336, 338 (Miss. 1931).

> Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law.

State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (holding that ownership of real property does not include right to bar access to governmental services available to migrant workers or to visitors of the workers' choice).

At its core, the tenant's legal possession includes the ability to exclude all others from the property, and, in fact, creates a duty to ward off trespassers. 2 *Powell on Real Property*, § 16B.02(2) (Michael Wolf ed., 1995). Conversely, this means that the tenant in possession has the authority to invite people onto the property as he or she so chooses. William Stoebuck et al., *The Law of Property*, § 7.1, at 411 (2000). Unless there is a specific agreement to the contrary, this right

[16] The United States Housing Act of 1937 recognized state "civil and criminal jurisdiction in and over" federally owned public housing projects and explicitly preserved "the civil rights under the State or local law of the inhabitants on such property" Pub. L. No. 75-412, § 13(b), 50 Stat. 888, 895.

is absolute.[17]

> [T]he tenant, when in possession of the demised premises, has the right to invite or permit such persons as the tenant's business interests or pleasure may suggest to come upon the premises, for any lawful purpose, and the landlord has no right to prohibit such persons from coming on the demised premises.

49 Am. Jur. 2d *Landlord and Tenant* § 504 (1995). See also *Commonwealth v. Hood*, 452 N.E.2d 188, 194 (Mass. 1983).

Many state courts have weighed the tenant's possessory interest to invite guests against the landlord's desire to bar the particular guest. They have held that the tenant, as the one in possession of the property, has legal control over who may enter the premises, and this control can be exercised regardless of the landlord's objections. *See* A. W. Gans, Annotation, *Right of Owner of Housing Development or Apartment Houses to Restrict Canvassing, Peddling, Solicitation of Contributions, etc.*, 3 A.L.R.2d 1431 (1949); *State v. Lawson*, 7 S.E. 905 (N.C. 1888) (overturning trespass conviction where jury was improperly instructed that tenant's authority was "subservient" to landlord's) (internal quotations omitted). The tenant enjoys the "final word" on who may come onto the premises. *State v. Schaffel*, 229 A.2d 552, 561 (Conn.

[17] A tenant possessor's right to invite guests could be altered in advance by the lease contract, but only if the tenant agrees to such language. *See e.g., Williams v. Nagel*, 643 N.E.2d 816, 822 (Ill. 1994) (holding that tenant had not extended valid invitation because lease provided that management had the right to bar people from the property). There is no evidence in the record that the RRHA lease contained an agreed upon provision that management is permitted to bar residents' guests and visitors from the property. Even if RRHA had complied with proper procedures to include a lease provision regarding any regulations concerning residents' accommodation of guests and visitors, it could not limit these rights to the extent that its practice does so here. See discussion of federal statutory and regulatory right to reasonable accommodation *supra* Part I.A.

Cir. Ct. 1966) (holding that tenants could invite housing inspectors on property); *see also Hall v. Commonwealth*, 49 S.E.2d 369, 378 (Va. 1948) (commenting that each "householder and not the owner exercises the right to determine whether he will receive the visitor, be he an acquaintance or a stranger"). In some instances, courts have found that landlords have breached the warranty of quiet enjoyment for attempting to interfere with a tenant's ability to invite guests. *See, e.g., Ashley Court Enters. v. Whittaker*, 592 A.2d 1228, 1231 (N.J. Super. Ct. App. Div. 1991); *Branish v. NHP Prop. Mgmt.*, 694 A.2d 1106, 1108 (Pa. Super. Ct. 1997).

All landlords who enter into a lease relationship are subject to these principles, regardless of whether they operate public or private housing. *See L.D.L. v. State*, 569 So.2d 1310, 1312-13 (Fl. Dist. Ct. App. 1990) (reversing criminal trespass conviction where nonresident invited by public housing resident); *In re Jason Allen D.*, 733 A.2d 351, 368 (Md. Ct. Spec. App. 1999) (holding that housing authority has no more or less right to exclude social guest of tenant than does landlord whose tenants are not recipients of a public subsidy); *Messiah Baptist Hous. Dev. Fund v. Rosser*, 400 N.Y.S.2d 306, 308 (N.Y. City Ct. 1977) (holding that subsidized tenants may enjoy residence in manner similar to private tenants).

A nonresident who is invited onto a property by a tenant who lives in a rental property with multiple units must necessarily use common areas to get to the tenant's property. The law is clear that an invitation by a tenant necessarily includes the right to use any common walkways, hallways, or any other methods of ingress or egress in order to get to the tenant's unit and effectuate the invitation.

> [T]hird persons who come upon the-premises at the express or implied invitation of a tenant or whose entry is naturally incident to business carried on by the tenant, have the right, as occasion requires, to make reasonable use of

> the tenant's means of ingress to and egress from the demised premises. . . . The easement which a tenant has for purposes of access to the premises extends to the members of the tenant's family and to guests and invitees.

49 Am. Jur. 2d *Landlord and Tenant* § 629 (1995). Otherwise, an invitation would be meaningless if guests could not use common areas to travel to the tenant's leased premises. *See State v. Schaffel*, 229 A.2d at 562 (holding that inspectors invited by tenants had right to be in common areas); *L.D.L. v. State*, 569 So.2d at 1312 (overturning trespass conviction where defendant was invited by tenant, stating that a "landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property. This law also applies to the common areas of the premises."); *Lott v. State*, 132 So. at 338 (concluding that rights essential to enjoyment of premises include those of ingress and egress); *Williams v. Lubbering*, 63 A. 90 (N.J. 1906) (holding that visitor, like tenant, entitled to ingress and egress); *Todisco v. Tishman Realty & Constr.*, 62 N.Y.S.2d 458, 459 (N.Y. Sup. Ct. 1946) (holding that invitee has right to use tenant's usual means of ingress and egress); *Commonwealth v. Burford*, 73 A. 1064 (Pa. 1909). This right of non-residents to use common areas has sometimes been conceptualized as an easement or license, *see Commonwealth v. Richardson*, 48 N.E.2d 678, 682 (Mass. 1943), or as joint ownership, *see City of Bremerton v. Widell*, 51 P.3d 733, 738 (Wash. 2002), *cert. denied* 123 S. Ct. 497 (2002).

Under common law principles, public housing residents, like those living in Whitcomb Court, retain the right of exclusive possession of leased premises and, accordingly, the right to invite and receive guests and visitors. Their guests and visitors are further allowed to use the common public and private streets, sidewalks, walkways, and hallways as a

method of ingress and egress.[18]

2. An invitation by a tenant operates as a defense to the criminal charge of trespass.

The overwhelming recognition of invitation as a defense to a charge of criminal trespass further underscores public housing residents' rights to have guests and other visitors in their homes. Criminal trespass statutes arose out of the aforementioned common property law principles. 75 Am. Jur. 2d *Trespass* §§ 162, 165 (1991). Because the purpose of these criminal statutes is to protect the possessor of the property "whether titleholder or not" from unwanted intrusions, an invitation by a tenant in possession provides a defendant with a legal defense to a landlord's charge of criminal trespass: "One who thus comes upon the premises upon the invitation of the tenant, although expressly forbidden to do so by the landlord, is not guilty of a criminal trespass." 49 Am. Jur. 2d *Landlord and Tenant* § 504; *accord* 75 Am. Jur. 2d *Trespass* § 180 (1991). Numerous courts have recognized invitation as a defense. *See e.g., People v. Washington*, 762 N.E.2d 698, 700 (Ill. App. Ct. 2002) (reversing criminal trespass conviction because defendant invited by a resident); *State v. Dixon*, 725 A.2d 920, 922 (Vt. 1999) (reversing criminal trespass conviction because tenant had consented to defendant's presence even though landlord had banned defendant from building); *cf. People v. Rynberk*, 415 N.E.2d 1087, 1091 (Ill. App. Ct. 1980) (observing that tenant's invitee cannot be deemed a trespasser as a matter of law). The defense of tenant invitation is also valid when a trespass is charged for entry onto the common areas. *See Lott v. State*, 132 So. at 337. The tenant invitation defense also applies in cases of nonresidents who are charged with criminal trespass onto public housing authority property. *See In re Jason Allen*

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[18] These common law rights are unrelated to and unaffected by any analysis of whether the streets in Whitcomb Court are a public or nonpublic forum for purposes of the First Amendment.

D., 733 A.2d at 363; *L.D.L. v. State*, 569 So.2d 1310; *cf. Thompson v. Ashe*, 250 F.3d at 405; *Daniel v. City of Tampa*, 38 F.3d 546, 550 (11th Cir. 1994). Once a criminal trespass defendant asserts this defense, the prosecution carries the burden of demonstrating that the defendant had no legitimate reason to be on the property. *See Bean v. United States*, 709 A.2d 85, 86-87 (D.C. 1998); *see also People v. Washington*, 762 N.E.2d at 700-01; *cf. In re Jason Allen D.*, 733 A.2d at 365-66.

In this case, Respondent was charged with criminal trespass for coming to the property even though he told the charging police officer that he was there to get "pampers for his baby." J.A. 55. The Petitioner asserts that the summons was issued because Respondent returned to the property after being issued a permanent barment notice by the landlord RRHA. Pet. Br. at 21. This notice was issued even though there are no facts in evidence that the Respondent engaged in drug-related or dangerous criminal activity that RRHA sought to curb,[19] or that RRHA considered Respondent's relationships with residents. Visiting a tenant who is a relative is certainly a legitimate reason to be on the property. Inconsistent with the civil and criminal law of trespass, the RRHA policy impermissibly fails to recognize invitation as an acceptable reason to be on the property.

C. PUBLIC HOUSING RESIDENTS HAVE CONSTITUTIONALLY PROTECTED RIGHTS TO ASSOCIATE WITH OTHERS IN THEIR HOMES AND

[19] The only criminal conviction attributed to the Respondent other than trespassing is a charge of damaging property, which the state intermediate court found was not related to the RRHA barment notice issued to Mr. Hicks. *Hicks v. Commonwealth,* 548 S.E.2d 249, 252 n.2 (Va. Ct. App. 2001) (*en banc*). In any event, although the record does not reflect why, the Respondent must have already been banned from RRHA property on some earlier occasion, as he had already been convicted of trespassing there earlier. J.A. 66.

TO HAVE ACCESS TO INFORMATION AND IDEAS.

1. The RRHA no-trespass policy infringes upon public housing residents' rights to intimate association.

The right of intimate association recognizes the importance of constitutionally sheltering the choice to enter and maintain certain intimate human relationships free from undue interference from the State "because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984); *see also Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45 (1987).[20] Under Supreme Court jurisprudence, family relationships represent the high end of the continuum of the types of personal bonds deserving of constitutional protection. "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 619-20.

Mr. Hicks' mother, aunt, children and his children's mother live in the public housing complex owned by RRHA. J.A. 70. Certainly, at a minimum, the relationship between a mother and her son and a father and his children exemplify the highly personal relationships that deserve the constitu-

[20] It is not clear whether the right of intimate association has its origins in the First Amendment, substantive due process under the Fourteenth Amendment, or a hybrid of the First and Fourteenth Amendments. *See* Colin O'Connor Udell, *Intimate Association: Resurrecting a Hybrid Right*, 7 Tex. J. Women & L. 231, 233-43 (1998). Although the Court in *Roberts* did not identify the exact constitutional source of the right of intimate association, it left no doubt that the freedom of intimate association is protected as a "'fundamental element of personal liberty.'" *Id.* at 237 (quoting *Roberts v. United States Jaycees*, 468 U.S. at 618).

tional protection recognized in *Roberts*.[21] The RRHA trespass policy, however, bans Mr. Hicks from visiting his mother or his children in their public housing homes and eviscerates the right of public housing residents to decide who they can invite into their homes.

Undeniably, RRHA has an interest in eradicating dangerous criminal activity in public housing. Allowing RRHA to exercise virtually limitless authority to exclude all nonresidents from visiting their family members in their own homes is not the least restrictive or even a reasonable alternative to eliminate the criminal activity on RRHA property. *Cf. McKenna v. Peekskill Hous. Auth.*, 647 F.2d 332 (2nd Cir. 1981) (holding that housing authority's requirement that residents obtain permission for and register overnight guests violates residents' freedom of association under the First Amendment); *State v. Holiday*, 585 N.W.2d 68, 70-71 (Minn. Ct. App. 1998) (concluding that exclusion of nonresident from all housing authority properties "seriously impinges upon the freedom of association of persons such as [nonresident], who testified that he had friends and family living in [housing authority] properties.").[22] Indeed, other options ex-

[21] At the time Mr. Hicks was cited for trespass, he "stated he was bringing pampers to his baby." J.A. 57. At his sentencing he explained, "prior to all the trespass charges that I have, it was due to the fact of me trying my best to take care of my children and make sure that my girl get everything that she needed." J.A. 67. Mr. Hicks' desire to maintain a relationship with his children strikes at the heart of the right of intimate association. Supreme Court jurisprudence has long extended constitutional protection to personal relationships that "attend the creation and sustenance of a family." *Roberts*, 468 U.S. at 619 (citations omitted); *cf. Troxel v. Granville*, 530 U.S. 57 (2000) (holding that substantive due process clause of Fourteenth Amendment protects right of parents to make decisions regarding the care, custody, and control of their children without undue state interference).

[22] The Court's decision in *Department of Hous. and Urban Dev. v. Rucker* is not to the contrary. 122 S. Ct. 1230 (2002). *Rucker* rejected tenants' claims that the housing authority's statutory right to evict tenants for unlawful drug-related activities of others implicated tenants' right of

ist to address illegal activity on the property including intervention by law enforcement to arrest a person who engages in criminal activity and prohibiting persons from returning to the property who have committed certain dangerous criminal activities.[23] Suggesting that Mr. Hicks should arrange to visit his mother and young children at a location other than RRHA property cannot save the trespass policy from its constitutional infirmities. The right of association "is too basic in our constitutional regime to deal with roughshod." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring); *cf. Schneider v. State*, 308 U.S. 147, 163 (1939) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised some other place").

2. The RRHA no-trespass policy violates residents' First Amendment rights to receive information.

Residents of public housing have the constitutionally protected right to have access to information and ideas offered to them by residents and nonresidents through such mechanisms as campaigning, leafleting, and organizing. "For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible & Tract Soc. of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2086 (2002). Correlated with nonresidents' constitutionally protected right to distribute information, residents necessarily have the right to receive it. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Vasquez v. Hous. Auth. of El Paso*, 271 F.3d 198, 202 (5th Cir. 2001) (holding that the First Amend-

association. 122 S. Ct. at 1236 n.6. Here, however, the policy directly and substantially intrudes upon residents' right to associate with nonresident family members in their public housing homes in order to engage in *lawful* activities. In addition, the residents of Whitcomb Court whose constitutional freedom of association is infringed by the no-trespass policy have not failed to abide by a term of their lease.

[23] See the discussion of alternative guest policies *infra* Part II.

ment guarantee of an unrestricted flow of information into the marketplace of ideas "extends not only to those who contribute to the market place of ideas, but necessarily extends to those who seek to benefit from the resultant dialogue"), *reh'g en banc granted*, 289 F.3d 350 (5th Cir. 2002) and *petition for cert. filed*, 71 U.S.L.W. 3578 (U.S. Dec. 19, 2002) (No. 02-1276). Public housing residents, not PHAs, must be the final arbiter in the decision regarding whether they will receive information and ideas that are offered to them. *See Martin*, 319 U.S. at 147 (holding "each householder" should have "the full right to decide whether he will receive strangers as visitors").

The RRHA no-trespass policy poses a substantial risk of infringing upon the rights of public housing residents to have constitutionally protected access to the marketplace of information and ideas. Under the unwritten policy, the housing authority manager has the unbounded discretion to deny requests by nonresidents to enter the public housing property in order to distribute information to residents or to hold religious services. J.A. 37-38. Residents' First Amendment right to receive information or be exposed to ideas should not be controlled by a government agent's sole discretion. *See Cantwell v. State*, 310 U.S. 296 (1940) (holding statute unconstitutional that required approval of government before soliciting for religious cause door-to-door); *Schneider v. State*, 308 U.S. 147 (holding ordinance unconstitutional that prohibited canvassing, solicitation, or distribution of circulars house-to-house without a permit from chief of police). The housing authority manager's ability to prevent public housing residents from receiving potentially welcomed information on the streets and sidewalks of the property or in residents' own homes violates the First Amendment rights of residents as well as the rights of nonresidents. *See Vasquez*, 271 F.3d 198 (holding that housing authority's policy of completely barring nonresidents from distributing political literature and campaigning on its property was unreasonable); *Walker v.*

Georgetown Hous. Auth., 677 N.E.2d 1125 (Mass. 1997) (holding that prohibition on door-to-door solicitation and campaigning violated First Amendment rights of residents). Such limitless discretion infringes on the rights of public housing residents to make their own decisions whether to receive or reject information regarding political, religious, cultural or other matters of potential interest and importance to their lives, thus isolating them from the broader spectrum of ideas and information.

II. HOUSING AUTHORITIES CAN CREATE POLICIES WHICH PROTECT RESIDENTS' RIGHTS AND CONTRIBUTE TO SAFE COMMUNITIES.

The broad no-trespass policy used by RRHA is not necessary to protect residents from criminal activity in their community. While the public housing tenants submitting this brief are entitled to and desire assistance from housing authorities to control drugs and violence on the property, the standardless policy promulgated by RRHA is unwelcome and unlawful. Public housing tenants sign residential leases as do private tenants, and central to those contracts is the tenant's right to be the full possessor of the premises during the lease term. Public housing residents want safety but do not wish to lose basic rights in the process. The broad discretion sought to be exercised by the Petitioner will too often target nonresidents who are lawful visitors. This unfortunate result is the inevitable consequence of a practice which places too much power in a landlord's hands and ignores a tenant's statutory, common law, and constitutional rights.

RRHA's ability to address crime on the property is not hindered by recognition of a tenant's right to accommodate law-abiding guests and other visitors. *See In re Jason Allen D.*, 733 A.2d at 368 ("our holding does not undermine the Housing Authority's ability to invoke the provisions of [the criminal trespass statute] against persons who trespass on Housing Authority property without a bona fide claim of

right, or who otherwise engage in criminal activity"). Rather, housing authorities and states can simultaneously address critical safety issues on the public housing property, preserve tenants' rights, and ensure fairness.

The first obvious method of crime deterrence is the use of existing criminal prohibition statutes if a resident or nonresident commits a crime on housing authority property.[24] In addition, federal regulations already fully address issues of crime prevention in public housing. For example, a tenant can be held responsible for the criminal and disruptive acts of her household members, guests, and other visitors. *See* 42 U.S.C. § 1437d(*l*)(6); 24 C.F.R. § 966.4(f)(10) – (12); 24 C.F.R. § 966.4(*l*)(5)(vii)(C) (providing that tenant can be required to exclude culpable household member in order to continue residing in housing unit); *see also Department of Hous. and Urban Dev. v. Rucker*, 122 S. Ct. at 1233; *cf.* Va. Code Ann. § 55-248.31:01 (forbidding a landlord from barring a tenant's guest, except where the guest violates the lease or a local, state, or federal law). What distinguishes these existing methods from the RRHA no-trespass policy is that, in situations such as these, the nonresident's conduct violates a proscribed standard. The use of a broad trespass-barment policy such as the RRHA practice is made unnecessary in light of these and other appropriate law enforcement methods.

[24] The use of no-trespass policies to preempt possible criminal behavior that has not yet occurred treads in very dangerous territory. Courts should not be persuaded by the housing authority cry that without trespass barment policies "PHAs must, in their crime control efforts, rely entirely on catching criminal offenders in the act . . . on each and every occasion." Amici Large Public Housing Authorities et al. Br. at 13. Our criminal justice system does not embrace the idea that one can punish a crime before it is committed or even attempted. To proceed otherwise would undermine our current judicial system and turn the operation of public housing properties into science-fiction-like police states.

> The basic legalistic drawback to precrime methodology [is] . . . [w]e're taking in individuals who have broken no law. . . . Happily they *don't* – because we get them first, before they can commit an act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they *are* innocent.

Philip K. Dick, *The Minority Report, in The Minority Report and Other Classic Stories by Philip K. Dick* 71 (1987) (words of Precrime Commissioner John Anderton).

In order to avoid unnecessary, illegal, and inequitable pitfalls, reasonable housing authority policy governing nonresident entry on property should, at a minimum, be drafted in conjunction with tenant participation.[25] It should also outline the specific conduct that will trigger a notice of barment, provide a method by which residents and nonresidents can challenge such barment and notice of that procedure,[26] provide a periodic review or expiration of each notice, and provide a set of criteria which will result in the barment being lifted. *See e.g., Commonwealth v. Wallace*, 730 N.E.2d 275 (Mass. 2000) (upholding injunction prohibiting non-resident from returning who had committed violent and destructive acts on housing authority property; injunction was obtained through procedure pursuant to statute affording opportunity for trial on merits). Other simple checks could include the housing authority or police confirming a guest's explicit or implicit invitation with the relevant resident prior to issuing any trespass summons or arrest. *See Bean v. United States*, 709 A.2d at 87 (overturning conviction because prosecution presented no evidence that police determined whether defen-

[25] See earlier discussion of importance of tenant participation *supra* n.15.

[26] PHAs are required to notify a tenant of any grounds for a proposed adverse action by the PHA and "afford the tenant the opportunity for a hearing under the PHA grievance procedure." 24 C.F.R. § 966.4(e)(8). *See also* 42 U.S.C. § 1437d(k). Certainly, the prohibition of a resident's guest or visitor and the jeopardizing of a tenant's lease if he accommodates a banned person are adverse actions against a tenant warranting these procedural protections.

dant was with a tenant); *Hall v. Commonwealth*, 49 S.E.2d at 371-72 (concluding that system of announcing visitors to tenants prior to entry allows tenant to make appropriate determinations of who can visit). Safety can be gained without using practices that eviscerate a tenant's full enjoyment of the leased premises.

III. THE COURT NEED NOT AND SHOULD NOT DRAW A DISTINCTION BETWEEN THE HOUSING AUTHORITY AS LANDLORD AND SOVEREIGN.

No justification exists to support the adoption of Petitioner's proposal to create a distinction between the housing authority as landlord and as a sovereign entity, thereby permitting government landlords to act in manners that would otherwise violate the Constitution. Neither *Rucker* nor any other authorities cited by Petitioner countenance such a conclusion.[27]

In *Rucker*, the Court held that section 1437d(*l*)(6) of the U.S. Housing Act "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity." 122 S. Ct. at 1238. In response to concerns about due process for residents' property interests, the Court noted that the housing authority was not acting as a sovereign but as a landlord in invoking its right under a statutorily sanctioned lease clause to evict tenants for the drug activity of its household members or guests. 122 S. Ct. at 1236. The discussion of the sovereign issue only served to distinguish that the housing authority's discretion to evict tenants for the drug activity of others was not based on a policy of the housing authority's

[27] Notably, only one of the six amici in support of Petitioner supports this novel proposal. *See* Amici Large Public Housing Authorities Br. at 16. Not even RRHA, the City of Richmond, or the U.S. Solicitor General saw fit to do so.

own design; rather, on this limited issue, like a private landlord, the housing authority's authority to evict arose from a statutorily required lease provision.[28] Unlike *Rucker*, no statute or lease provision permits or requires RRHA to bar residents' guests or other visitors from the housing authority property.[29]

Furthermore, the Court need not answer the question articulated by the Petitioner as to whether the public housing authority acts as landlord or sovereign. In making the determination of whether the conduct occurred in a public or non-public forum for purposes of the First Amendment, the Court assesses the nature of the housing authority's functions and responsibilities toward its residents. This new suggestion adds nothing to the analysis of a government landlord's functions, and the Court should avoid creating a new distinction in a case where it adds nothing to the analysis and the consequences are unforeseeable and potentially devastating to well-established rights of residents. If such a distinction ever must be drawn, this is not the appropriate case or set of circumstances for doing so.

Finally, to the extent that the law should distinguish government as landlord and sovereign, the difference is that public housing tenants have additional substantive and procedural rights arising from the constitutional limitations on the exercise of government power. *E.g., Thorpe v. Hous. Auth. of Durham*, 386 U.S. 670, 678 (1967) (Douglas, J., concurring) (quoting *Rudder v. United States*, 226 F.2d 51, 53 (D.C. Cir. 1955)) ("'The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law.'").

[28] Amici also agree with Respondent that the distinction in *Rucker* is inapposite here because the RRHA is attempting to broadly regulate the general populace; *i.e.*, nonresidents.

[29] Such a lease provision would be impermissible under the U.S. Housing Act. *See* discussion *supra* Part I.A.

The Court should not fundamentally alter the relationship between PHAs and public housing residents without more careful consideration than this case can allow.

CONCLUSION

Amici respectfully request that this Court affirm the Virginia Supreme Court's reversal of Mr. Hicks' conviction and its determination that the RRHA no-trespass policy is unconstitutional. The important and established statutory, common law, and constitutional rights of public housing residents to accommodate guests and visitors provide further justification for this outcome.

Respectfully submitted,

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